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20 Massachusetts Ave, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

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INTEROFFICE MEMORANDUM

MEMORANDUM FOR REGIONAL DIRECTORS
SERVICE CENTER DIRECTORS
DISTRICT DIRECTORS AND OFFICERS IN CHARGE
NATIONAL BENEFITS CENTER DIRECTOR
REGIONAL COUNSEL

FROM: Michael Aytes /s/
Acting Associate Director for Operations

Dea Carpenter /s/
Acting Chief Counsel

SUBJECT: Effect of *Perez-Gonzalez v. Ashcroft* on adjudication of Form I-212 applications filed by aliens who are subject to reinstated removal orders under INA § 241(a)(5)

1. Purpose

This memorandum provides interim policy guidance in light of the judgment of the U.S. Court of Appeals for the Ninth Circuit in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), and cases in other federal circuits, addressing inadmissibility under section 212(a)(9) of the Immigration and Nationality Act (INA) and eligibility to apply for adjustment of status in conjunction with a request for consent to reapply for admission to the United States. This memorandum instructs adjudicators on handling of Forms I-212, Application for Permission to Reapply for Admission Into the United States After Deportation and Removal filed with USCIS offices within or outside of the Ninth Circuit.

2. Background

Prior to 1996, an alien who was deported or removed and sought readmission to the United States within 5 years of the date of deportation or removal (within 20 years in the case of an aggravated felon) was deemed inadmissible unless the alien, prior to returning to the United States, obtained the Attorney General's consent to reapply for admission. See former 212(a)(6) of the INA, 8 U.S.C. 1182(a)(6) (1990). The former Immigration and Naturalization Service published a regulation at 8 CFR § 212.2(e), which allowed such aliens to seek permission to reapply for admission while in the United States, when filed in conjunction with an adjustment application. In addition, 8 CFR § 212.2(i) provided that any approval of the Form I-212 would be retroactive to the date when the alien departed for the United States. This regulation has not been updated since the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, P.L. 104-208, 110 Stat. 3009-546, 3009-576 (IIRIRA).

Under IIRIRA, the text of section 241(a)(5) of the INA, 8 U.S.C. § 1231(a)(5), was amended to provide that an alien who is subject to a reinstated removal order is not eligible for "any relief" from removal. Also, IIRIRA added new section 212(a)(9)(C)(i) of the INA, which makes an alien inadmissible at any time if the alien, on or after April 1, 1997, re-enters or attempts to re-enter without being admitted after having been ordered removed (at any time) or having been unlawfully present (after April 1, 1997) for more than a year, in the aggregate. Such an alien, however, may request that DHS consent to his or her reapplying for readmission to the United States, but only if: (1) the request is made before the alien re-embarks for the United States (or before the alien seeks admission from Canada or Mexico), and (2) more than 10 years has elapsed from the date of last departure.[1]

In the *Perez-Gonzalez* case, the Department argued that the 1996 IIRIRA amendments to section 241(a) and 212(a) of the INA trumped the regulations at 8 CFR 212.2 relating to the ability to apply for relief within the United States in conjunction with an adjustment application and to receive retroactive application of the approval to the date when the alien was removed. Despite this statutory language, the court in *Perez-Gonzalez* held that an alien is entitled to a decision on a Form I-212, filed before the actual reinstatement of the prior removal order, before U.S. Immigration and Customs Enforcement (ICE) can execute the reinstated order. *See* 379 F.3d at 788. Approval of the Form I-212, according to the court, would permit the alien's adjustment of status. This ruling, however, is limited only to aliens whose cases are governed by Ninth Circuit law.

3. Field Guidance

A. Aliens Seeking Consent to Reapply Prior to Expiration of Required 10-Year Period

As noted above and as recently reaffirmed by the Board of Immigration Appeals (BIA) in *Matter of Torres-Garcia*, 23 I & N Dec. 866, 873 (BIA 2006),[2] an alien inadmissible under section 212(a)(9)(C) of the Act cannot even file for consent to reapply for admission to the United States until he or she has been abroad for at least 10 years.

Therefore, in any case where an alien is inadmissible under section 212(a)(9)(C)(i) of the INA and 10 years have not elapsed since the date of the alien's last departure from the United States, USCIS should deny any Form I-212 requesting consent to reapply for admission.

Note: The date of the alien's formal deportation or removal is not always the date of last departure. For example, an alien may have been deported on January 1, 2000, but subsequently re-entered unlawfully on April 1, 2003 and departed again on May 1, 2004. The date of last departure in this scenario would be May 1, 2004 and the alien is not eligible to seek consent to reapply for admission until May 1, 2014.

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[1] If DHS grants consent to reapply, then the alien is no longer inadmissible under section 212(a)(9)(C)(i) of the INA. The grant does not, however, waive or except the alien from inadmissibility under section 212(a)(9)(B)(i) of the INA.

[2] In *Matter of Torres-Garcia*, the alien had received consent to reapply under section 212(a)(9)(A) of the INA. He re-entered without admission after the approval of that relief. The BIA noted, first, that being granted consent to reapply does not authorize an alien to enter unlawfully. It only permits the alien to follow the normal procedures for lawful admission. 23 I & N Dec. at 872. The BIA also held that, if an alien is inadmissible under section 212(a)(9)(C)(i) of the INA, the alien is eligible to apply for consent to reapply for admission only after having been abroad at least 10 years. Id. at 873.

B. Aliens Seeking Consent to Reapply After Required 10-Year Period -- and Subject to a Reinstated Removal Order

In any case where: (1) an alien is inadmissible under section 212(a)(9)(C)(i) of the INA; (2) 10 years have elapsed since the date of the alien's last departure from the United States; and (3) ICE has reinstated removal proceedings pursuant to section 241(a)(5) of the INA, USCIS should deny any Form I-212 request for consent to reapply for admission. The decision denying the Form I-212 should include the following language:

> "The applicant was removed from the United States under a removal order, and returned on or about (date). On (date), U.S. Immigration and Customs Enforcement reinstated the removal order entered against the applicant. This reinstatement makes the applicant ineligible for "any relief" under the immigration laws. INA § 241(a)(5), 8 U.S.C. § 1231(a)(5). Section 241(a)(5) bars approval of the applicant's Form I-212. *Berrum-Garcia v. Comfort*, 390 F.3d 1158 (10th Cir. 2004); *Lattab v. Ashcroft*, 384 F.3d 8 (1st Cir. 2004); *Padilla v. Ashcroft*, 334 F.3d 921 (9th Cir. 2003). Accordingly, the Form I-212 is denied."

Note: *Perez-Gonzalez* does not preclude denial of the Form I-212 in this situation, even in the 9th Circuit. *Padilla, supra*. *Perez-Gonzalez* found that *Padilla* did not apply because the alien filed the Form I-212 *before* ICE reinstated the removal order. 379 F.3d at 788.

C. Aliens Seeking Consent to Reapply After Required 10-Year Period Who Are not Yet Subject to a Reinstated Removal Order

1. General Rule

Except for cases arising in the Ninth Circuit, in any case where: (1) an alien is inadmissible under section 212(a)(9)(C)(i) of the INA; (2) 10 years have elapsed since the date of the alien's last departure from the United States; and (3) ICE has not yet reinstated the removal order pursuant to section 241(a)(5) of the INA, USCIS should refer the alien's case to ICE and defer adjudication of the Form I-212 until after ICE has decided whether to reinstate the order.[3]

If ICE reinstates the order, USCIS will then deny the Form I-212 using the sample text provided above in section B. If ICE chooses not to reinstate the order, USCIS should exercise its discretion and analyze the alien's eligibility for relief considering both positive and negative factors as guided by current published precedent decisions. The alien's inadmissibility under section 212(a)(9)(C) is, itself, a negative factor that USCIS may properly consider in determining whether to exercise discretion favorably. See INS v. Yang, 519 U.S. 26 (1996).

2. Special Rule for Cases Arising in the Ninth Circuit

In light of *Perez-Gonzalez*, in any case where: (1) an alien is inadmissible under section 212(a)(9)(C)(i) of the INA; (2) 10 years have elapsed since the date of the alien's last departure from the United States and (3) the alien filed the Form I-212 before ICE had reinstated the removal order pursuant

[3] There are a number of cases where, if the alien re-entered the United States prior to April 1, 1997, and subsequently sought some form of relief or filed for an immigration benefits (such as filing a Form I-130, Form I-485 and/or Form I-212), ICE's ability to automatically reinstate a removal order under section 241(a)(5) of the INA may be affected. Whether ICE is able to reinstate will depend on the law of the circuit where the case arises. USCIS, however, is not precluded from adjudicating a pending I-212.

to section 241(a)(5) of the INA, USCIS should adjudicate the Form I-212, even if ICE reinstates the order while the Form I-212 is still pending. Any I-212 applicant who does not satisfy all of the criteria listed above should have his or her Form I-212 denied. USCIS should analyze the alien's eligibility for relief considering both positive and negative factors as guided by current published precedent decisions. The alien's inadmissibility under section 212(a)(9)(C) is, itself, a negative factor that USCIS may properly consider in determining whether to exercise discretion favorably. See INS v. Yang, 519 U.S. 26 (1996).

4. Contact Information

Questions regarding this memorandum may be directed by email through appropriate supervisory channels to Jonathan Mills, Office of Product and Regulatory Development (OPRD) and Michael J. Sheridan, USCIS Office of Chief Counsel.

Attachment – *Matter of Torres-Garcia*, 23 I & N Dec. 866 (BIA 2006).